80-809

Supreme Court, U. S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

LITTON SYSTEMS, INC.,
Petitioner,

v.

ALVIN L. LUNDY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KARL WIESENBURG, ESQ.
WIESENBURG & REED
Post Office Box 1428
Pascagoula, Mississippi 39567
(601) 762-3255
Attorney for Petitioner.

Of Counsel:
JOHN H. CARLSON, ESQ.
Post Office Box 149
Pascagoula, Mississippi 39567

ROBERT L. ACKERLY, ESQ.
816 Connecticut Avenue, N.W.
Washington, D.C. 20006

Washington, D.C. • THIEL PRESS • (202) 638-4521

THE QUESTION PRESENTED FOR REVIEW

(1) Do the 1972 amendments of LHWCA permit a covered shipbuilder employee to maintain a 33 U.S.C. Section 905(b) third party negligence action against his shipbuilder employer for injuries recieved on a launched destroyer in the process of construction in its shipyard, notwithstanding the exclusive compensation remedy provisions of 33 U.S.C. Sections 905(a) and 933(i) of the Act?

TABLE OF CONTENTS

Page

THE QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS DELIVERED IN THE COURTS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT 4

I. The Court of Appeals decision conflicts with the decisions of this Court 4

II. The Court below has decided an important question of first impression which should be settled by this Court 10

III. The Court of Appeals has rendered a decision in conflict with the decisions of other courts on the same matter 15

CONCLUSION 19

APPENDICES:

Appendix A – Opinion of the 5th Circuit Court of Appeals, Aug. 20, 1980 ..... 1a

Appendix B – Judgment of the U.S. District Court for the Southern District of Mississippi, Dec. 11, 1978 ..... 4a

Appendix C – Memorandum to counsel from the Office of the Clerk, 5th Cir. Court of Appeals, August 20, 1980 ..... 5a

Appendix D – Order of the 5th Cir. Court of Appeals, Oct. 8, 1980, denying Petition for Rehearing and Petition for Rehearing En Banc 7a

Page

Appendix E – Letter to Karl Wiesenburg from the Office of the Clerk, 5th Cir. Court of Appeals, Oct. 22, 1980, Granting Stay of Mandate 8a

Appendix F – Statutes Involved 10a

TABLE OF AUTHORITIES

Cases:

Alfred v. M/V Margaret Lykes, 398 F.2d 684 (5 Cir. 1968) 5, 15

Allied Towing Corp. v. Tatem, 580 F.2d 702 (4 Cir. 1978) 17

Arvidson v. Dillingham Corp., 462 F.2d 1 (9 Cir. 1972), *cert. denied*, 409 U.S. 983 (1972) 17, 18

Baker v. Pacific Far East Lines, Inc., 451 F.Supp. 84 (N.D. Ca. 1978) 17

Bloomer v. Liberty Mutual Ins. Co., 100 S.Ct. 925 (1980) 6, 8

Bossard v. Port Allen Marine Service, Inc., 624 F.2d 671 (5 Cir. 1980) 9, 13

Buna v. Pacific Far East Line, Inc., 441 F.Supp. 1360 (N.D. Ca. 1977) 17

Calbeck v. Travelers Insurance Co., 370 U.S. 116 (1962) 4, 9, 10, 13

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 6, 8

Duncan v. Dravo Corp., 426 F.Supp. 1048 (W.D. Pa. 1977) 17

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1970) 6, 7, 10, 19

Frankel v. Bethlehem-Fairfield Shipyard, Inc., 132 F.2d 634 (4th Cir. 1942), *cert. denied*, 319 U.S. 746 (1943) 5

Cases, continued: Page

Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1921) 4, 5, 9, 13

Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 41-44, (3 Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) 17, 18

Haas v. 653 Leasing Co., 425 F.Supp. 1305 (E.D. Pa. 1977) 5, 16

Hess v. Port Allen Marine Service, Inc., 624 F.2d 673 (5 Cir. 1980) 9, 13

Hollister v. Luke Construction, et al., 517 F.2d 920 (5 Cir. 1975) 6

Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan, 551 F.2d 61 (5 Cir. 1977) 11, 12

Lawson v. United States, 605 F.2d 448 (1979) 13

Murphy v. Woods Hole, Martha's Vineyard, et al., 545 F.2d 235 (1 Cir. 1976) 16, 18

Napoli v. Hellenic Lines, 536 F.2d 505, 509 (2 Cir. 1976) 17

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) 11, 13

Olsen v. Todd Shipyards Corp., 435 F.Supp. 568 (W.D. Wa. 1977) 13

Reed v. The Yaka, 373 U.S. 410 (1963) 15, 16, 17, 18

Smith v. M/V Captain Fred, 546 F.2d 702 (5 Cir. 1977) 17

Sun Ship, Inc. v. Pennsylvania, 100 S.Ct. 2432 (1980) 6

Williams v. Avondale, 452 F.2d 955 (5 Cir. 1971) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

LITTON SYSTEMS, INC.,

Petitioner,

v.

ALVIN L. LUNDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) appears at 624 F.2d 590. There was no opinion of the United States District Court for the Southern District of Mississippi. The order of that Court granting petitioner summary judgment is attached (Appendix B).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on August 20, 1980 (Appendix C). A petition for rehearing was denied on October 8, 1980 (Appendix D). The Court of Appeals stayed the mandate on October 22, 1980 (Appendix E). Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. Section 1254(l).

STATUTES INVOLVED

The statues which the case involves are 33 U.S.C. 902 (1), (2), (3), (4), & (21); 903(a); 905; 933(i). Their pertinent text is set forth in Appendix F.

STATEMENT OF THE CASE

On July 1, 1976 the petitioner was a shipbuilder prime contractor constructing new destroyers for the United States Navy. One of the destroyers, the DD966 had been launched and was in the process of construction while moored to a dock within the petitioner's shipyard, being prepared for builder's seatrials. The respondent, Alvin L. Lundy, a shipbuilder employee of the petitioner, was injured while working on the incomplete ship. He received full compensation for his injuries under Section 905(a) of the LHWCA.

After receiving full compensation from petitioner under the LHWCA, Mr. Lundy then brought an action against petitioner, plaintiff's shipbuilder employer, in the United States District Court for Southern District of Mississippi, claiming entitlement to damages: (a) pursuant to the Jones Act, 46 U.S.C. Section 688 *et seq.*, (b) pursuant to admiralty and general maritime law and (c)

pursuant to the provisions of LHWCA, 33 U.S.C. Section 905(b).

Petitioner moved in the District Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the complaint and alternatively for summary judgment pursuant to Rule 5(b).

On December 8, 1978 the District Court granted petitioner's motion for summary judgment. On December 11, 1978 the Court entered judgment dismissing the complaint, with prejudice.

On August 20, 1980 the Court of Appeals reversed the summary judgment. The opinion noted that the employee had abandoned his claims brought under general maritime law and the Jones Act. The Court said:

> ". . . we need only determine whether he has a claim under 33 U.S.C. Section 905(b). We find that he does, and accordingly, we reverse."

It then held that Section 905(b) of LHWCA was applicable because the incomplete destroyer under construction was a vessel under LHWCA and the petitioner shipbuilder was the owner of the vessel. The Court did not give its reason for such findings nor did it discuss the exclusive compensation remedies of the employer under Sections 905(a) and 933(i). Although the issues presented by this petition were again raised in the Court of Appeals by petitions for rehearing, the petitions for rehearing were denied without comment.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
THE COURT OF APPEALS DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Congress enacted LHWCA in 1927 to establish a workmen's compensation system for maritime employees whose injuries occured on navigable waters beyond the reach of state workmen's compensation statutes. The LHWCA makes the classic workmen's compensation trade-off between the employee's certainty of recovery on a no-fault basis and the limitation of his claim against his employer to the compensation specified in the statute. The currect 33 U.S.C. Section 905(a) [formerly Section 905] and 933(i) which makes the statutory compensation the employee's exclusive remedy against his employer has been part of the law since its enactment.

When Congress enacted the LHWCA in 1927, it was aware of this Court's prior holding in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, (1929) that:

(a) general admiralty jurisidiction extends to a proceeding to recover damages for a tort committed on a vessel in the process of construction when lying on navigable waters within the state, and,

(b) the applicable state compensation act (in the absence of a federal compensation act) is the exclusive remedy of the employee as against his employer.

In *Calbeck v. Travelers Insurance Co.*, 370 U.S. 116, (1962) this Court said:

> "Before the Longshoremen's Act was passed, this urt had sustained the validity of a state work-'s compensation statute as applied to injuries

> suffered by an employee engaged in the completion of a launched vessel under construction on navigable waters, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S. Ct. 157, 66 L. Ed. 321", * * *
>
> "There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; in every case, that is, where Jensen might have seemed to preclude state compensation. The statute's framers adopted this scheme in the Act because they meant to assure the existence of a compensation remedy for every such injury, * * *." (370 U.S. 116, 120-121, 82 S. Ct. 1197-1198, 1200)

Prior to the adoption of the 1972 amendments to LHWCA, all of the Circuit Courts of Appeal and District Courts followed the holding of this Court that the exclusive remedy of a shipbuilder employee against his shipbuilder employer for injuries received during the process of the construction of an incomplete ship is the compensation provided by the applicable compensation act. *Haas v. 653 Leasing Co.*, 425 F. Supp. 1305 (E. D. Pa. 1977), *Williams v. Avondale*, 452 F.2d 955 (5th Cir. 1971); *Alfred v. M/V Margaret Lykes*, 398 F.2d 684 (5th Cir. 1968); *Frankel v. Bethlem-Farifield Shipyard, Inc.*, 132 F.2d 634 (4th Cir. 1942), *cert denied*, 319 U.S. 746, (1943).

The adoption of the 1972 amendments did not change the exclusive compensation remedy provisions of the Act. Unamended Section 905(a) of the Act provides that the exclusive remedy of compensation liability is applicable to:

> "the employee * * * and anyone otherwise entitled to recover damages from such employer in law *or*

> *amiralty* on account of such injury or death." (emphasis added)

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, (1974), this Court said:

> "Indeed, the 1972 amendments to the Harbor Worker's Act re-emphasize Congress' determination that as between an employer and its injured employee, the right ot compensation under the Act should be the employee's exclusive remedy." (417 U.S. 112, 94 S. Ct. 2178)

No other Court of Appeals or District Court prior to the decision in this case had held that a covered shipbuilder employee may mainttain a 33 U.S.C. Section 905(b) third party negligence action aginst his employer for injuries received while engaged in the completion of a launched vessel under construction in navigable water.

In *Hollister v. Luke Construction, et al*, 517 F.2d 920 (5th Cir. 1975), the first case to reach the Fifth Circuit after the adoption of the 1972 amendments to LHWCA by a covered shipbuilder employee against his employer for injuries received in the construction of a ship, the Court of Appeals held:

> "The fact that the barge here was only partially completed at the time of plaintiff's injury is thus dispositive of his claim based on Luke's alleged maritime negligence. (Citations omitted) [517 F.2d 922]

This Court considered the adoption of the 1972 amendments to LHWCA in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, (1979); *Bloomer v. Liberty Mutual Insurance Company*, 100 S. Ct. 925 (1980); and *Sun Ship, Inc. v. Pennslyvania*, 100 S. Ct. 2432 (1980). In each of these cases this Court, after

reviewing their legislative history, held that it was not the purpose of the 1972 amendments to change, *sub silento*, the longstatnding rules of federal maritime law applicable to maritime tort actions based on negligence.

In *Edmonds v. Compagnie Generale Transatlantique*, *supra*, this Court said:

> "Admiralty law is judge-made law to a great extent, *United States v. Reliable Transfer Co.*, 421 U.S.397, 409, 95 S.Ct. 1708, 1714, 44 L.Ed.2d 251 (1975); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed.2d 720 (1963), and a longshoreman's maritime tort action against a shipowner was recognized long before the 1972 amendments, see *Pope & Talbut, Inc. v. Hawn*, 346 U.S. 406, 413-414, 74 S.Ct. 202, 207, 98 L.Ed.2d 143 (1953), as it has been since." (99 S.Ct. 2756)

This Court noted in note 6. to the quoted language:

> "33 U.S.C. Section 933(a), which was unchanged in 1972, states that when a longshoreman "determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive . . . compensation or to recover damages against such third person." Section 905(b), which was added in 1972, states that the longshoreman "may bring an action against [the shipowner] as a third party in accordance with the provisions of Section 933 . . ." (99 S.Ct. 2756)

In the same case, this Court said:

> "In 1972 Congress alighed the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. "One of the most controversial and difficult issues which [Congress was] required to

> resolve . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." S. Rep. 8. By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S., at 112, 94 S.Ct., at 2177; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S., at 285-286, 72 S.Ct., at 279-280. Once Congress had relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned. Indeed, Congress might have intended to adopt the existing maritime rule even for third-party actions under the Act that are not within the admiralty jurisdiction, though we need not and do not reach that issue today." (99 S.Ct. 2763)

This Court in *Bloomer v. Liberty Mutual Insurance Company, supra,* said:

> "We are unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation." (100 S.Ct. 932)

The legislative history of the adoption of the 1972 amendments, enunciated by this Court in these cases, together with the explanation of the purpose of the 1972 amendments set out in the U.S. Code Congressional and Administrative News, Second Session 1972, pages 4698 through 4720, do not support that conclusion reached by the Court of Appeals in this case that

Congress intended this Court to overrule the holding in *Grant Smith-Porter Ship Co. v. Rohde, supra.*

The 1972 amendments evidence a contrary intent. The Congress added to Section 905(b) the following language:

> "If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel."

The word "persons" is defined in Section 902(1) as:

> "(1) The term person means individual, partnership, corporation, or association."

In adding the cited language to Section 905(b), equally applicable to both construction and repair services, the Congress followed the holding of this Court in *Calbeck v. Travelers Insurance Co., supra,* that there is no distinction under the LHWCA between the compensation remedy rights of employees engaged in repair services to a vessel, and the compensation remedy rights of employees engaged in the construction of a vessel.

On the day after the Court of Appeals' decision in this case, the Fifth Circuit in *Bossard v. Port Allen Marine Service, Inc.,* 624 F.2d 671 (5 Cir. 1980) and *Hess v. Port Allen Marine Service, Inc.,* 624 F.2d 673 (5 Cir. 1980) held that a contractor making ship repairs is not the owner or owner pro hac vice of the vessel being repaired, and the exclusive remedy of the employee of the contractor is for compensation under the LHWCA.

In our petition for rehearing we called to the attention of the Court of Appeals that such disparate treatment of employees of ship repair contractors and employees of

shipbuilder contractors was not justified under the LHWCA, nor the 1972 amendments.

We submit that the Fifth Circuit Court of Appeals made the same error in making such a unwarranted distinction between employees engaged in ship repair services to an incomplete vessel in navigable waters, as was made by the same Court of Appeals in *Calbeck v. Travelers Insurance Co., supra.*

We respectfully submit that the decision of the Court of Appeals in this case conflicts with the decisions of this Court cited above.

II.
THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FIRST IMPRESSION WHICH SHOULD BE SETTLED BY THIS COURT.

As noted by this Court in *Edmonds v. Compagnie Generale Transatlantique, supra,* this Court has granted certiorari to resolve questions that have arisen in the Circuit Courts of Appeals and the District Courts of the meaning of the 1972 amendments to LHWCA. [433 U.S. 256, (1979), note 5].

The decision of the Court below in this case raises important questions of federal law in resolving the meaning and application of the 1972 amendments, particularly Sections 902(1), (2), (3), (21) and Section 905(b) considered *in pari materia* with unamended Sections 905(a) and 933(i).

The Court below decided that under the 1972 amendments a shipbuilder employer constructing a new ship launched in navigable waters is the owner of a vessel within the meaning of 33 U.S.C. Section 902(21) and that Section 905(b) permits a shipbuilder employee to

bring a third party negligence action against his employer notwithstanding the exclusive remedy provisions of Sections 905(a) and 933(i).

In *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, (1977), this Court held that the 1972 amendments to LHWCA extended broad compensation coverage to covered employees, "including a ship repairman, shipbuilder and shipbreaker ." [33 U.S.C. 902(3)].

This Court in *Northeast Marine Terminal Co., Inc. v. Caputo, supra,* held, as did the Fifth Circuit Court of Appeals in *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. vs. Morgan, supra,* that the 1972 amendments should be liberally construed as to compensation coverage and that the Court "should take an expansive view of the extended coverage." (432 U.S. 268).

The questions decided by the court below in this case as to the meaning of the 1972 amendments do not involve the extension of compensation coverage, but do extend third party negligence actions under Section 905(b) in a manner not heretofore allowed by the LHWCA, nor recognized by federal maritime law, and at variance with the Congressional intent as set out in the legislative history of the 1972 amendments to LHWCA.

At the time of the plaintiff's injury, the court found that the ship was still under construction and was 97% complete. The ship was neither in navigation nor operable. At the time of his injury, the shipbuilder-employee was employed by the shipbuilder for the purpose of making the ship operable so that it could subsequently undertake builder's sea trails.

The court below found none of these facts controlling. Relying on its broad compensation coverage holding in

Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan, infra, it held that:

> "Incomplete ships upon which 33 U.S.C. Section 902(3) employees are working at a site which [sic] the coverage of the Act, 33 U.S.C. Section 903, are vessels within the meaning of 33 U.S.C. Section 902(21). The USS Hewitt was thus moored to the statute."

The decision of the Fifth Circuit Court of Appeals in this case cited no judicial precedent except its prior holding in *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan,* 551 F.2d 61 (5th Cir. 1977). Morgan was shipfitter helper apprentice working in a fabrication shop in the petitioner's shipyard in Pascagoula, Mississippi. He died when a steel plate he was cleaning fell on him. The Fifth Circuit held:

> "The work of shipbuilding, however, commences before there is a launched vessel . . . Shipbuilders who do the initial work to construct a vessel for launching are, nonetheless, just as engaged in shipbuilding as those who are completing the task after something is finished which can be called a ship." [551 F.2d 62]

The Court of Appeals held that all shipbuilder employees engaged in the construction of a ship are entitled to compensation under Section 905(a) of the LHWCA, and are also entitled to maintain a third-party negligence action against their shipbuilder-employer under Section 905(b) for the same injury.

It is settled law that a ship repair employee may not maintain a third-party negligence tort action against his contractor employer on the theory that the employer was an owner or owner *pro hac vice* of the vessel under repair either prior or subsequent to the adoption of the

1972 amendments. *Olsen v. Todd Shipyards Corp.*, 435 F.Supp. 568 (W.D. Wa. 1977); *Lawson v. United States,* 605 F.2d 448 (1979); *Bossard v. Port Allen Marine Service, Inc., supra;* and *Hess v. Port Allen Marine Service, Inc., supra.*

These courts rejected the thesis that a contractor repairing a ship is either the owner or owner pro hac vice of the ship being repaired. No ratinale would justify different treatment for a shipbuilder than for a ship repair employer. This Court expressly rejected such disparate treatment in *Calbeck v. Travelers Insurance Co., supra.*

This Court has consistently sought to maintain the integrity of the LHWCA as a workmen's compensation act. It has approved the broad and liberal interpreation of the Act for such purposes as reflected in *Northeast Marine Terminal Co., Inc. v. Caputo, supra,* without compromising its exclusive remedy provisions.

The Court of Appeals' decision in the instant case departs from the previous holdings of this Court under established federal maritime law that a covered employee cannot maintain a third party negligence action against his employer for injuries compensable under LHWCA sustained during the process of the construction of a new vessel. *Grant Smith-Porter Ship Co. v. Rohde, supra.*

The broad and sweeping language of the court below that the DD-966 (USS Hewitt), while under construction in the petitioner's outfitting dock within its shipyard, was "moored to the statute" because the respondent was a covered employee under the Act will open the flood gates to a multitude of third-party negligence actions by covered employees against their shipbuilder-employers.

There is no logical reason for holding that a contractor who is repairing a ship temporarily removed from navigation is not a vessel owner for the purpose of a 33 U.S.C. Section 905(b) negligence action, but that a contractor who is constructing a ship that has not been in navigation and has not been delivered to its owner is a vessel owner and thus exposed to dual liability in the face of the clear language of Sections 905(a) and 933(i).

The decision of the court below involves a question of paramount importance to the entire shipbuilding industry of the United States. The broad and sweeping *per curiam* decision of the Court of Appeals will open a Pandora's box of litigation, not only by shipbuilders but by every covered employee under the 1972 amendments.

The third party negligence actions allowed under Section 905(b) must be uniformly interpreated as to all categories of maritime employees covered by the Act. The decision of the Court of Appeals has converted the LHWCA from a workmen's compensation act to a third party negligence tort act.

We respectfully submit that this massive assault on the integrity of the exclusive compensation remedy provisions of the LHWCA should be reviewed by this Court, and that this Court should reaffirm its previous holdings that the LHWCA is a workmen's compensation act, notwithstanding the adoption of the 1972 amendments.

III.
THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

Respondent argued in the court below that his 33 U.S.C. 905(b) third party negligence action against the petitioner should be permitted on the theory that the launched, but incomplete ship, in the process of construction was a vessel owned by the petitioner under the doctrine of *Reed v. The Yaka*, 373 U.S. 410, (1963).

Prior to the adoption of the 1972 amendments to LHWCA the Fifth Circuit Court of Appeals considered The Yaka doctrine in the context of the same claim that respondent urged in the court below. In *Alfred v. M/V Margaret Lykes,* 398 F.2d 684 (1968), the Court of Appeals said:

> "Appellant urges that Avondale was either the owner or owner *pro hac vice* of the vessel, seeking to invoke the doctrine of *Reed v. The Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). Accepting, arguendo, this claim, we consider it in the same light as the claim here asserted against Lykes. Neither The Yaka nor its lineal ancestor, *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), do good service to appellant here. They are inapposite. *Each one of those cases dealt with situations which arose with respect to a completed, commissioned vessel in service in navigation. * * * Appellant's exclusive remedy with respect to Avondale is under the Longshoremen's and Harbor Workers' Compensation Act, supra. . .*" (emphasis added) (398 F.2d 686)

We submit that this decision of the Court of Appeals correctly stated that applicable law both before the adop-

tion of the 1972 amendments to LHWCA and to the case before the Court. In a painstaking analysis of the applicability of the doctrine of *Reed v. The Yaka, supra,* to a case almost factually identical to this case, in *Haas v. 653 Leasing Co.,* 425 F.Supp. 1305 (1977), District Judge Edward R. Becker noted that the plaintiff in that case claimed:

> "* * * that his employer Sun Ship is liable to him notwithstanding the LHWCA compensation bar because of its role as an owner *pro hac vice* of the virtually completed hull which, though not a vessel in commerce, was nonetheless in navigable waters, hence subject to maritime jurisdiction. This argument proceeds from an analysis of the Supreme Court case of *Reed v. The Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963) and confronts the outer limits of what Judge Gibbons has described as the 'Sieracki-Ryan end-run.' As will be seen, we must reject the owner *pro hac vice* argument because of its inappliability (at least prior to the 1972 amendments to the LHWCA) to negligence as opposed to unseaworthiness claims, and grant Sun Ship's motion." [425 R.Supp. 1307 (1977)]

While, as Judge Becker points out, the doctrine of *Reed v. The Yaka, supra,* is not applicable to an incomplete vessel in the process of construction notwithstanding that it has been launched in navigable waters, there is a serious and unresolved conflict between the Circuit Courts of Appeal as to whether the *Reed v. The Yaka* doctrine applicable to completed ships in navigation has survived the adoption of the 1972 amendments to LHWCA.

The First Circuit (ruling by way of dictum), *Murphy v. Woods Hole, Martha's Vineyard, et al.,* 545 F.2d 235

(1 Cir. 1976), and the Ninth Circuit, *Arvidson v. Dillingham Corporation,* 462 F.2d 1 (9 Cir. 1972), *cert. denied,* 409 U.S. 983, (1972), have held that the extensive remedy of a covered employee is the compensation provided by the Act, and that the employees may not maintain a negligence action against his employer *qua* vessel.

District Courts within the Ninth Circuit have reached decisions consistent with the holding of that Circuit. *Buna v. Pacific Far East Line, Inc.,* 441 F.Supp. 1360 (N.D. Ca. 1977), and *Baker v. Pacific Far East Lines, Inc.,* 451 F.Supp. 84 (N.D. Ca. 1978), hold that such an action may not be maintained, notwithstanding the 1972 amendments.

The Second, Third, Fourth, and Fifth Circuits relying on *Reed v..The Yaka,* 373 U.S. 410, (1963), have taken contrary positions. *Napoli v. Hellenic Lines,* 536 F.2d 505, 509 (2nd Cir. 1976); *Griffith v. Wheeling Pittsburgh Steel Corporation,* 521 F.2d 31, 41-44, (3rd Cir. 1975), *cert. denied,* 423 U.S. 1054, (1976); *Allied Towing Corp. v. Tatem,* 580 F.2d 702 (4th Cir. 1978); and *Smith v. M/V Captain Fred,* 546 F.2d 702 (5th Cir. 1977). The District Court within those Circuits have likewise followed the holdings of the controlling appellate Court. *Duncan v. Dravo Corp.,* 426 F.Supp. 1048 (W.D. Pa. 1977).

In all of the cases cited, the vessel involved was a completed vessel in commerce or navigation and the Section 905(b) negligence action was against the shipowner.

The existing division in the Circuits is succinctly stated in *Buna v. Pacific Far East Line, Inc., supra,* as follows:

> "Thus, barring Section 905(b) negligence suits when the vessel owner is the employer is both log-

ical and consistent with the philosophy underlying workmen's compensation schemes.

"Second, negligence actions are not equivalent to actions based on the doctrine of seaworthiness for purposes of sidestepping the exclusive remedy language of the LHWCA. *Arvidson v. Dillingham Corp.*, 462 F.2d 1 (9 Cir.) *cert. denied*, 409 U.S. 983, (1972). Interpreting the pre-1972 amendment LHWCA, the *Arvidson* court saw a clear distinction between the traditional, absolute, and non-delegable obligation of a shipowner to provide a seaworthy vessel and ordinary negligence by that shipowner. The court concluded that the right to proceed against a vessel owner/employer should not be extended to negligence claims.

"The Court of Appeals for the First Circuit followed the *Arvidson* court in distinguishing between seaworthiness and negligence in deciding *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1976). Although the *Murphy* decision interpreted the pre-amendment law, the court criticized *Griffith* and discussed the 1972 amendments in concluding that an injured harbor worker's negligence action against his employer is barred by the exclusive remedy provision (Section 905) of the LHWCA." [441 F.Supp. 1367]

In view of the existing conflicts between the Circuit Courts of Appeal on the question of whether under the 1972 amendments a covered employee may bring a Section 905(b) action against his employer qua vessel, the holding in this case extending the *Reed v. The Yaka* doctrine to incomplete ships in the process of construction is certain to evoke further conflicting and irreconcilable holdings among the Circuit Court of Appeals and District

Courts. This Court should resolve such conflicts to decide the question raised but left unanswered in *Edmonds v. Compagnie Generale Transatlantique, supra,* in which this Court said:

> "* * * Indeed, Congress might have intended to adopt the existing maritime rule even for third-party actions under the Act that are not within the admiralty jurisdiction, though we need not and do not reach that issue today." [99 S.Ct. 2763]

CONCLUSION

Congress, in enacting the 1972 amendments to the LHWCA, stated in the legislative history of the Act that legal questions arising under 33 U.S.C. Section 905(b) negligence actions should be determined as a matter of federal law. Federal law is currently in a state of upheaval because of the opinion of the court below in this case. Shipbuilder-employers are now subject to third-party negligence actions by their shipbuilder-employees during any stage of construction of a new

ship notwithstanding that the employer has paid full compensation under Section 905(a) of the LHWCA to the covered employees.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

By: _____

KARL WIESENBURG, ESQ.
WIESENBURG & REED
Post Office Box 1428
Pascagoula, Mississippi 39567
(601) 762-3255
Attorney for Petitioner.

Of Counsel:
JOHN H. CARLSON, ESQ.
Post Office Box 149
Pascagoula, Mississippi 39567

ROBERT L. ACKERLY, ESQ.
816 Connecticut Avenue, N.W.
Washington, D.C. 20006

APPENDIX

APPENDIX A

Alvin L. LUNDY, Plaintiff-Appellant,

v.

LITTON SYSTEMS, INC.,
Defendant-Appellee.

No. 79-1061.

United States Court of Appeals,
Fifth Circuit.

Aug. 20, 1980.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GOLDBERG, TATE, and SAM D. JOHNSON, Circuit Judges.

PER CURIAM.

On July 1, 1976, plaintiff-appellant, Alvin L. Lundy, who is a meter calibrator, was working on the USS Hewitt, DD-966, when he fell through an escape hatch which had been left open by one of the ship's crew. At the time of the accident. the USS Hewitt, undergoing construction and preparations for sea trials, was 97% complete and moored in an outfitting dock. To recover for his injuries, appellant brought suit against his employer, Litton Systems, Inc., defendant-appellee, which was also owner of the ship. Appellant claimed entitlement to recovery under the doctrine of seaworthiness, the Jones Act, 46 U.S.C. §688, and the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b). He appeals from the district court's dismissal of his claims upon appellee's motion for summary judgment. Because appellant had abandoned his claims brought under the doctrine of seaworthiness and

the Jones Act, we need only determine whether he has a claim under 33 U.S.C. §905(b).[1] We find that he does, and, accordingly, we reverse.

The district court held that an incomplete ship was not a vessel for purposes of section 905(b). We disagree.

The definitional section of the LHWCA provides that "[t]he term 'vessel' means any vessel upon which or in connection with which a person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment . . . ." 33 U.S.C.A. §902(21)(West 1978). Persons entitled to benefits under the LHWCA are "employees." See *id* §903(a). "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-

---

[1] 33 U.S.C.A. §905(b)(West 1978) provides the following:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occured. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

worker including a ship repairman, shipbuilder, and shipbreaker . . . ." *Id.* §902(3). we have previously held that "[s]hipbuilders who do the initial work to construct a vessel for launching are . . . just as engaged in shipbuilding as those who are completing the task after something in finished which can be called a ship." *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan,* 551 F.2d 61 (5th Cir. 1977). Thus, incomplete ships upon which 33 U.S.C. §902(3) employees are working at a site which the coverage of the Act, 33 U.S.C. §903, are vessels within the meaning of 33 U.S.C. §902(21). The USS Hewitt was thus moored to the statute.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

[Filed Dec. 11, 1978]

Civil Action No. S78-0286(R)

ALVIN L. LUNDY,
Plaintiff,

v.

LITTON SYSTEMS, INC., A CORPORATION,
Defendant

JUDGMENT

This action came on for consideration before the Court, Honorable Dan M. Russell, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered granting the alternative motion for summary judgment of the defendant Litton Systems, Inc.,

IT IS ORDERED AND ADJUDGED that the alternative motion of the defendant Litton Systems, Inc. for summary judgment is granted and the complaint is dismissed, with prejudice.

Dated at Biloxi, Mississippi, this the 11th day of December, 1978.

HARVEY G. HENDERSON, Clerk

By: /s/ Agnes Dyesc
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

August 20, 1980

Gilbert F. Ganucheau
Clerk

Tel 504/589-2570
600 Camp Street
New Orleans, La. 70130

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 79-1061 – ALVIN L. LUNDY vs. LITTON SYSTEMS, INC.

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 17 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Clare F. Sachs
Deputy Clerk

enc.

cc: Mr. Bobby G. O'Barr
Mr. Karl Wiesenburg
Mr. French Caldwell

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Oct. 8, 1980]

No. 79-1061

ALVIN L. LUNDY,
Plaintiff-Appellant,

versus

LITTON SYSTEMS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(Opinion 8/20/80, 5 Cir., 197__, ___F.2d___).

(October 8, 1980)

Before GOLDBERG, TATE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

October 22, 1980

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

Mr. Karl Wiesenburg
Attorney at Law
P.O. Box 26
Pascagoula, MS. 35967

NO. 79-1061 – ALVIN L. LUNDY v.
LITTON SYSTEMS, INC.

MANDATE STAYED TO AND INCLUDING November 21, 1980

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court, effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore,

will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, CLERK

/s/ Jason Perkins
Deputy Clerk

/bh
enc.
cc: Mr. Bobby G. O'Barr

APPENDIX F

STATUTES INVOLVED

33 U.S.C. 902

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the couse of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operation, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to loan or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the couse of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. 903

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

33 U.S.C. 905

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason therof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall

not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. 933

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ; Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

No. 80-809

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LITTON SYSTEMS, INC.,

Petitioner,

v.

ALVIN L. LUNDY,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BOBBY G. O'BARR
Attorney at Law
Post Office Box 541
Biloxi, Mississippi 39533
(601) 435-5536

Attorney for Claimant-Respondent.

Washington, D.C. • THIEL PRESS • (202) 638-4521

THE QUESTION PRESENTED FOR REVIEW

(1) At the time of Claimant-Respondent's claimed injuries, DD-966 was a vessel within the meaning and purview of 33 USC Section 905(b) and Section 902(21), and Litton Systems, Inc. was the vessel's owner, owner *pro hac vice*, operator, or master and is subject to liability for the vessel negligence of DD-966 even though Litton Ship Systems, Inc. was also the employer of Claimant-Respondent and the exclusive compensation remedy provision of 33 USC Section 905(a) and 933 (i) of the Act do not apply.

TABLE OF CONTENTS

Page

THE QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

JURISDICTIONAL STATEMENT 1

STATUTES INVOLVED 2

COUNTER-STATEMENT OF THE CASE 2

ARGUMENT

I. The Court of Appeals' decision does not conflict with the decision of this Court 5

II. The Court below has decided an important question by following the precedent set by itself and other circuits. 12

III. The Court of Appeals has not rendered a decision in conflict with the decision of other Courts of Appeal on the same matter 15

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Alfred v. M/V Margaret Lykes, 398 F.2d 684, (5th Cir. 1968) 10, 15

Allied Towing Corp. v. Tatem, 580 F.2d 702, (4th Cir. 1978) 12, 22

Arvidson v. Dillingham Corp., 462 F.2d 1, (9th Cir. 1972), *cert. den.*, 409 U.S. 983 (1972) 16

Baker v. Pacific Far East Lines, Inc., 451 F. Supp. 84 (N.D. Ca. 1978) 16, 17

Bloomer v. Liberty Mutual Insurance Company, 100 S.Ct. 925 (1980) 11

Bossard v. Port Allen Marine Service, Inc., 624 F.2d 671 (5th Cir. 1980) 11, 14

Buna v. Pacific Far East Line, Inc., 441 F. Supp. 1360 (N.D. Ca. 1977) 16, 17

Cases, continued: Page

Complaint of Allied Towing Corp., 416 F.Supp. 1207 (Vir. 1976) 12, 22

Duncan v. Dravo Corp., 426 F.Supp. 1048, (Penn. 1977) 11, 12, 20, 24

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 61 L.Ed.2d 521, 99 S.Ct. 2753 (1979) 10, 17

Fitzgerald v. Compania Naviera La Molinera, 394 F.Supp. 402 (La. 1974) 12, 22

Frankel v. Bethlehem Fairfield Shipyard, Inc., 132 F.2d 634 (4th Cir. 1942), *cert. den.* 319 U.S. 746 (1943) 10

Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 41-44, (3rd Cir. 1975), *cert. den.*, 423 U.S. 1054 (1976) 12, 18

Haas v. 653 Leasing Company, 425 F. Supp. 1305, (E.D. Pa. 1977) 10, 15

Hess v. Port Allen Marine Service, Inc., 624 F.2d 673 (5th Cir. 1980) 12, 14

Hollister v. Luke Construction Company, et al., 517 F.2d 920 (5th Cir. 1975) 11

Jackson v. Lykes Bros. Steamship Co., 386 U.S. 371 (1967) 10, 11, 17

Lawson v. United States, 605 F.2d 448 (1979) 14

Lundy v. Litton Systems, Inc., 624 F.2d 590 2

Murphy v. Woods Hole, Martha's Vineyard, et al., 545 F.2d 235 (1st Cir. 1976) 16

Napoli v. Hellenic Lines, 536 F.2d 505, (2nd Cir. 1976) 12, 20

Olsen v. Todd Shipyards Corp., 435 F. Supp. 568 (W.D. Wa. 1977) 14

Reed v. S.S. Yaka, 373 U.S. 410 (1963) 9, 10, 11, 12, 17

Cases, continued: Page

Ryan Stevedoring Co. v. Pan Hellenic S.S. Corp., 350 U.S. 124 (1956) 7

Seas Shipping Company v. Sieracki, 328 U.S. 25 (1946) 7

Smith v. M/V Captain Fred, 546 F.2d 119, (5th Cir. 1977) 12, 22

Williams v. Avondale, 452 F.2d 955 (5th Cir. 1971) 10

Other Authorities:

33 U.S.C. Section 902(3) 4

33 U.S.C. Section 902(21) 1, 4, 5, 25

33 U.S.C. Section 903 4

33 U.S.C. Section 905(a) 2

33 U.S.C. Section 905(b) 2, 4, 6-18, 20-24

33 U.S.C. Section 933(i) 2, 25

Senate Report No. 92-1125, 92D Congress, 2d Sess., p. 102, 103 and 104 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-809

LITTON SYSTEMS, INC.,

Petitioner,

v.

ALVIN L. LUNDY,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Claimant-Respondent prays that a Writ of Certiorari be denied to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 20, 1980. *Lundy v. Litton Systems, Inc.*, 624 F.2d 590.

JURISDICTIONAL STATEMENT

The Claimant-Respondent does not question the jurisdiction as set forth in the Petition.

STATUTES INVOLVED

The Claimant-Respondent does not question the statutes involved as set forth in the Petition, but does ask that this Writ of Certiorari be denied.

COUNTER-STATEMENT OF THE CASE

On July 1, 1976, DD-966 had been on its first builder's sea trials on June 28 and 29, and had trouble with the prop while on said trials. DD-966 returned to Ingalls' dock on the navigable Pascagoula River and on July 1, 1976 was in the process of returning to sea to complete the builder's sea trials. DD-966 did in fact return to sea trials on the early morning of July 2, 1976.

Respondent was on board DD-966 on July 1, 1976 as directed by his employer, Litton Systems, Inc. He signed on board on the morning of July 1, 1976 at 10:00 A.M. and was doing routine readiness for preparation of sea trials in his field. This included checking telephones, fuses, checking out the generators and going through a check list that he had to go through whenever a vessel went on sea trial. He was also calibrating shipboard meters and was setting up a telephone communication for engineering and the crew members. At the time he was injured, there was a problem in generator number 3, and as he was going down an escape hatch, fell, severely injuring himself. On the escape hatch where he fell, a chain which guards the opening was not in place. The area where he fell was enclosed and was not lighted. Respondent did not have any maritime experience on board ships of any type, kind or size.

The affidavit of Mark Farnum indicates that on July 1, 1976 DD-966 was approximately 97% complete. There

were twenty-eight (28) escape hatches on the main deck of DD-966 which were provided for access to spaces below the main deck. These hatches were left open by Petitioner during preparation for builder's trials so that workmen could obtain immediate access to compartments below the main deck.

The agreement between Litton Systems, Inc. and International Brotherhood of Electrical Workers, which was in full force and effect on July 1, 1976, was introduced as Exhibit 2 to the deposition of O. W. Patterson. It appears from Article 22, page 37 of said contract, that employees of Litton were taken from their regular work to make up a crew for sea trials and deliveries, and were required to stand six (6) hour watches. Under this section of the contract Litton Systems, Inc. recognized that the work that the craftsmen would be engaged in would be aboard a vessel or ship at sea.

O. W. Patterson was the Master of DD-966 on July 1, 1976. He had been the Master on the first builder's sea trial on June 28 and 29, 1976. He had thirty-five (35) years at sea and had a Master's license. He recognized that on sea trials he had people on board who did not understand the hazards at sea. He further recognized that the duties that the Respondent performed in seeing after the generators was necessary for the ship to operate and that ships at sea had personnel who had done the same job on seagoing vessels. Most of Ingalls' sea trials lasted about 48 hours. A Master of a vessel is in equal rank to the Skipper of a Navy vessel. He stated that as Master he was responsible for the safety of all personnel and operation and the deployment of ships to a predeter-

mined location in the Gulf of Mexico to conduct equipment and system tests during the trial. He conceded that the safety regulations required that all open hatches had proper guard rails.

He stated that as the Master of DD-966, he had two (2) watch officers, and four (4) quartermasters to run the bridge of the ship. He stated that there were permanently assigned approximately twenty (20) men in fire and damage control. Sea trials were done under the exclusive operational control of Litton Systems, Inc. On the date of the accident, Litton still had control of said vessel and had not delivered it to the U.S. Navy.

Based on these facts the Court of Appeals held that Respondent had a 33 USC Section 905(b) negligence action against Litton Systems, Inc., his employer, who was also owner of DD-966 at the time of the claimed injury. The Court of Appeals further held that incomplete ships upon which 33 USC Section 902(3) employees are working at a site within 33 USC Section 903 coverage of the Act are vessels within the meaning of 33 USC Section 902(21).

ARGUMENT

I.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISION OF THIS COURT.

In 1972, when the Longshoremen's and Harbor Workers' Act was amended, Congress extended the maritime jurisdiction landward to include any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker, and including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining areas customarily used by an employer in loading, unloading, repairing, or building a vessel.

Prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Act, 33 USC Section 902 did not contain a definition of the word "vessel." The amendments were enacted on November 26, 1972 and 33 USC Section 902(21) was added and is as follows, to-wit:

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master, officer, or crew member."

It is therefore submitted that Congress intended and did change the definition of "vessel."

At the time of the enactment of the amendments to the Longshoremen's and Harbor Workers' Act Congress was aware of the definition of a "vessel."[1] Congress did

---

[1] *"Vessel" is included in all means of water transportation.* The word "vessel" includes every description of water carft or other

[footnote continued]

not define "vessel" as one being in navigation, but simply said the term "vessel" meant any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charterer or bare boat charterer, master, officer or crew member.[2]

33 USC Section 905(b) provides in the event of injury to a person covered under this chapter caused by the negligence of the vessel, then such person may bring an action against such vessel as a third party in accordance with the provision of Section 33 of the Act.

Employees covered under the Act are any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, shipbuilder, and ship breaker.[3]

It is therefore submitted that Congress intended to and did grant to an injured shipbuilder who is covered under the Act and who was injured by the negligence of a vessel, a 905(b) negligence action against his employer who was also owner of the vessel. This is true because in Section 905(b), *supra*, in the third sentence, Congress stated that if a person was employed by a vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of the person engaged in providing shipbuilding or repair services to the vessel. In the last sentence, Congress stated that the remedy provided in this subsec-

---

artificial contrivance used, or capable of being used, as means of transportation on water. 1 USC Section 3.

[2] 33 USC 902(21).

[3] 33 USC 902(3).

tion shall be exclusive of all other remedies against the vessel except remedies available under this Act. This indicates that an employee may draw compensation as well as sue a vessel for 905(b) negligence.

By the 1972 amendments, Congress rejected the thesis and this Court's previous decisions that a vessel should be liable without regard to its fault for injuries sustained by employees covered under the Act while working onboard the vessel, and specifically took away the vessel's absolute nondelegable duty to provide a seaworthy vessel for longshoremen and others who perform work on the vessel which by tradition had been performed by seamen.[4]

Congress also rejected the vessel's right to recover the damages for which it was liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore had breached an express or implied warranty of workmanlike performance to the vessel under this Court's previous decisions.[5]

In lieu of these previous causes of action, Congress created a new 905(b) negligence action for those employees providing stevedoring, shipbuilding or repair services to vessels who are injured because of the vessel's negligence.

The legislative history, Senate Report No. 92-1125, 92D Congress, 2d Sess., p. 102, 103 and 104 states as follows:

> "Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to

---

[4] *Seas Shipping Company v. Sieracki*, 328 US 25 (1946).

[5] *Ryan Stevedoring Co. v. Pan Hellenic S.S. Corp.*, 350 US 124 (1956).

all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as landbased third parties in non-maritime pursuits.

"The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'nondelegable duty', or the like.

"Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness." ***

* * * * *

"Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."

* * * * *

"The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is em-

ployed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to *ship building* or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or *ship builders* or repairmen as apply when an independent contractor employs such persons." (Emphasis added).

It was clearly the intent of Congress, in providing a 905(b) negligence action, to impose a duty on all vessel owners to meet the objective of encouraging safety because the vessel would still be required to exercise the same care as a land-based person in providing a safe place to work. This duty clearly extends to persons furnishing longshoring services, *shipbuilders* and ship repairers equally.

Congress clearly intended that the doctrines set forth in *Reed v. S.S. Yaka, supra,* survive the amendments to the Act and that an injured longshoreman or shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor.

In *Edmonds v. Compagnie Generale Transatlantique*, 443 US 256, 61 L Ed 2d 521, 99 S Ct 2753 (1979), this Court reversed the United States Court of Appeals for the Fourth Circuit because of its interpretation of the first two sentences of Section 905(b), *supra*. This Court construed the second sentence of said section to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its non-stevedoring capacity contributes to the injury. In construing the second sentence this Court cited *Jackson v. Lykes Bros., supra,* and *Reed v. Yaka, supra,* as upholding the longshoreman's negligence or unseaworthiness action against the shipowner-stevedorer. (See footnote 13). It would necessarily follow that this Court would construe the third sentence to permit a third-party suit against the vessel providing its own shipbuilding or repair service when negligence in its owner, owner *pro hac vice*, operator, or master's capacity contributes to the injury. Therefore, the Court of Appeals' decision in the case at bar does not conflict with the decisions of this Court.

On page 5 of its brief, the Petitioner cites *Haas v. 653 Leasing Company*, 425 F. Supp. 1305 (E.D.Pa. 1977); *Williams v. Avondale*, 452 F.2d 955 (5th Cir. 1971); *Alfred v. M/V Margaret Lykes*, 398 F.2d 684 (5th Cir. 1968); *Frankel v. Bethelem-Fairfield Shipyard, Inc.*, 132 F.2d 634 (4th Cir. 1942), cert. denied, 319 U.S. 746 (1943). Each of these cases arose prior to the 1972 amendments and have no application to the case at bar.

On page 6 of Petitioner's brief, it is asserted that no other Court of Appeals or District Court prior to the decision in the case at bar had held that a covered shipbuilder employee may maintain a 905(b) third party negligence against the employer for injuries received

while engaged in completion of a launched vessel under construction in navigable waters. In the case of *Duncan v. Dravo Corp.*, 426 F. Supp. 1048 (Penn. 1977) the District Court allowed a 905(b) cause of action for a ship repairer on a vessel not in navigation against his employer-barge owner.

The Petitioner on page 6 of its brief cites *Hollister v. Luke Construction Company, et al,* 517 F.2d 920 (5th Cir. 1975) as authority under Point One of its brief. *Hollister, supra,* did not involve a claim under 905(b) but involved a Jones Act claim, an unseaworthiness claim, and a general maritime negligence claim. Since the barge did not meet the "vessel in navigation" requirement, the Jones Act and unseaworthiness claims were dismissed and since the barge was only partially completed its maritime negligence claim was dismissed. Therefore, this case has no application to the case at bar.

Bloomer v. Liberty Mutual Insurance Company, 100 S.Ct. 925 (1980) is cited as authority under Point One on page 8 of the Petitioner's brief. This case merely held that a stevedore-employer paying compensation to longshoreman injured on ship who sues the shipowner for negligence is not required under the Longshoremen's and Harbor Workers' Act to share longshoreman's litigation costs and has no application to the case at bar.

The legislative history of the adoption of the 1972 amendments supports the conclusion reached by the Court of Appeals in this case that Congress did not intend to overrule *Jackson v. Lykes Bros., supra,* and *Reed v. S.S. Yaka, supra,* in permitting a longshoreman's negligence or unseaworthiness action against the shipowner-employer.

On page 9 of Petitioner's brief, it cites *Bossard v. Port Allen Marine Service, Inc.,* 624 F.2d 671 (5th Cir. 1980)

and *Hess v. Port Allen Marine Service, Inc.*, 624 F.2d 673 (5th Cir. 1980) as authority under Point One of its brief. Exxon was first sued as owner of the barge under Section 905(b) and after failing there, Plaintiff then sought action against Port Allen, alleging that it was liable as owner *pro hac vice* of the barge Exxon 217. The 5th Circuit, in affirming entry of summary judgment by the District Court, stated that Port Allen was the bailee and did not have the control necessary to be deemed an owner *pro hac vice*, and did not have the complete control over the barge required for ownership *pro hac vice*. In the case at bar, it is undisputed that the sea trials were done under the exclusive operational control of Litton Systems, Inc.

It is respectfully submitted that the decision of the Court of Appeals in this case does not conflict with the decisions of this Honorable Court.

II.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION BY FOLLOWING THE PRECEDENT SET BY ITSELF AND OTHER CIRCUITS.

The Court below followed the precedent set in *Reed v. S.S. Yaka, supra, Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402 (La. 1974), *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 41-44, (3rd Cir. 1975), cert. den., 423 US 1054 (1976), *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (Vir. 1976), *Napoli v. Hellenic Lines*, 536 F.2d 505 (2nd Cir. 1976), *Duncan v. Dravo Corp.*, 426 F. Supp. 1048 (W.D. Penn. 1977), *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977), *Allied Towing Corp. v. Tatem*, 580 F.2d 702 (4th Cir. 1978). The Court of Appeals below simply held that the incompleted ship in question was a vessel for purposes of a Section 905(b) negligence action.

It is undisputed that DD-966 had been to sea on one occasion on June 28 and 29 and was preparing to return to sea on July 1, 1976 and did in fact return to sea on the early morning of July 2, 1976. It is undisputed that in the agreement between Litton Systems, Inc. and the International Brotherhood of Electrical Workers, which was in full force and effect on July 1, 1976, that the employees of Litton were taken from their regular work to make up a crew on what the agreement called a vessel. It is undisputed that the vessel was under the control of O. W. Patterson, Master of said vessel, on July 1, 1976, that sea trials were under the exclusive operational control of Litton Systems, Inc., and on the date of the accident, Litton had control of said vessel. The Petitioner would infer to the Court that the Court of Appeals found that Litton Systems, Inc. was the owner when in truth and in fact this point is undisputed by their own witnesses, Farnum and Patterson.

As owner, Congress intended to give the Respondent a cause of action for negligence to meet the objective of encouraging safety and requiring the vessel owner to exercise due care. The Court of Appeals followed the Congressional intent and prior precedents of this Court as shown in Point One of this brief.

While DD-966 was not in navigation as far as the Jones Act coverage, or an unseaworthiness claim, it was certainly operable and was being operated by a licensed Master and 905(b) applies.

The Petitioner on page 11 asserts that the Court of Appeals' decision is in variance with the Congressional intent but does not point out to this Court where the variance may be.

On page 12 of Petitioner's brief, it asserts that it is settled law that a ship repair employee may not maintain

a third party negligence tort action against his contractor-employer, on the theory that the employer was the owner or owner *pro hac vice* of the vessel under repair either prior or subsequent to the adoption of the 1972 amendments, citing *Olsen v. Todd Shipyards Corp.*, 435 F. Supp. 568 (W.D. Wa. 1977); *Lawson v. United States*, 605 F.2d 448 (1979); *Bossard v. Port Allen Marine Service, Inc., supra;* and *Hess v. Port Allen Marine Service, Inc., supra.* These cases merely hold that the employer in each instance was a bailee and not owner *pro hac vice* under the facts of each case because each employer did not have sufficient control necessary to be deemed an owner *pro hac vice.* In the case at bar it is undisputed that Litton Systems, Inc. was the owner and had complete operational control of said vessel at the time of the injury complained of. Each of the cases cited by the Petitioner recognized that if the employer occupied the position of owner *pro hac vice* with respect to the vessels in question, the employees could maintain an action notwithstanding the provision of 33 USC Section 905. In *Lawson, supra,* the Plaintiff was allowed to recover against the United States under 905(b).

The remainder of Petitioner's argument on page 13 and page 14 of its brief is in conflict with the Congressional intent and history. The Petitioner has not attacked the constitutionality of the amendments, and therefore its philosophical argument is not in order.

It is respectfully submitted that the Court of Appeals' decision in this case should not be reviewed on the basis of any arguments set forth in Point Two of Petitioner's brief.

III.

THE COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISION OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

Petitioner cites *Alfred v. M/V Margaret Lykes*, 398 F.2d 684 (1968) on page 15 under Point Three. In this case it was unequivocally stated that Lykes was the owner of the vessel in question. In the case at bar, it is undisputed that Litton Systems, Inc. was the owner and had exclusive control of said vessel at the time of the alleged injury. The Court held that the warranty of seaworthiness extended to shore-based worker only at a time when the vessel was ready for sea and in navigation. This case has no application to the case at bar.

On page 16 of Petitioner's brief, it cites *Haas v. 653 Leasing Company, supra,* which is a District Court case and which arose out of an injury occurring on September 20, 1971. This was prior to the 1972 amendments which were effective November 27, 1972. In *Haas*, there was a claim for unseaworthiness and maritime negligence. The unseaworthiness claim was rejected because the vessel was not in navigation. The maritime negligence claim was rejected because of the inapplicability of the owner *pro hac vice* argument to negligence as opposed to unseaworthiness claim. However, the Court stated that the *pro hac vice* argument was inapplicable at least prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Petitioner asserts that there is a conflict between the Circuit Courts of Appeals on the question of whether under the 1972 amendments a covered employee may bring a Section 905(b) action against his employer *qua* vessel. However, a review of the authorities cited by the

Petitioner does not indicate a conflict between the Circuit Courts of Appeals since the 1972 amendments, which were effective on November 27, 1972. It cites two District Court cases from the 9th Circuit which may or may not be in conflict and states that in all the cases cited on the last paragraph of page 16 and page 17 of its brief all vessels involved were a completed vessel in commerce and in navigation, which is an error, as will be shown hereafter.

Murphy v. Woods Hole, Martha's Vineyard, et al, 545 F.2d 235 (1st Cir. 1976) arose out of an injury on October 25, 1972 which was prior to the effective date of the amendments to the Act. The Court held that it would give Section 905 its ordinary meaning and hold that a negligence action of the present character, brought by a harbor worker covered by the pre-1972 Act for injuries caused by the alleged actual negligence of the vessel owned by his employer, was barred by Section 905.

Arvidson v. Dillingham Corp., 462 F.2d 1 (9th Cir. 1972), cert. denied, 409 U.S. 983 (1972) was decided on May 26, 1972 and arose prior to the effective date of the amendments to the Act. The Court held that where the employer is also the shipowner, Section 905 does not preclude an accident for unseaworthiness but that the recovery would not be extended to an action for negligence. Congress in their 1972 amendments took away the unseaworthiness cause of action but granted injured ship builders a 905(b) negligence cause of action against the owner-employer.

Petitioner next cites *Buna v. Pacific Far East Line, Inc.,* 441 F. Supp. 1360 (N.D. Ca. 1977) and *Baker v. Pacific Far East Lines, Inc.,* 451 F. Supp. 84 (N.D. Ca. 1978) as being in conflict although they are not cases

from the Court of Appeals but rather District Courts. In *Baker, supra,* the District Judge interpreted the first, second and third sentences of Section 905(b). He interpreted the second and third sentences of Section 905(b) as Congress's attempt to overrule *Yaka, supra.* This Court in *Edmonds v. Compagnie General Transatl., supra,* interpreted the second sentences of 905(b), (footnote 13), citing *Jackson v. Lykes, supra,* and *Reed v. S.S. Yaka, supra,* as upholding a longshoreman's negligence or unseaworthiness action against the shipowner-stevedore. The same interpretation would apply to the third sentence involving shipbuilders and ship repairers.

Therefore, this Honorable Court in *Edmonds, supra,* has overruled the interpretations given to 905(b) in *Buna, supra,* and *Baker, supra,* and therefore no conflict exists between the Circuit Courts of Appeals.

In *Reed v. Yaka,* 373 U.S. 410, reh. den. 375 U.S. 872 (1963), this Court recognized that a bare boat charterer was personally liable for the unseaworthiness of the chartered vessel and that the Longshoremen's and Harbor Workers' Act did not prevent recovery by a plaintiff for the employer-charterer's breach of its warranty of seaworthiness. Reed's employer at the time of his accident was also the bare boat charterer of the vessel "Yaka". Reed was performing longshoremen's service and the evidence reflected that the negligence of his employer-bare boat charterer was the cause of his injuries. Reed's employer had full possession and control of the vessel at the time of the injury and the question was whether or not the Longshoremen's Act prevented recovery by Reed for his employer-bare boat charterer's breach of its warranty of seaworthiness. This Court held that the Longshoremen's and Harbor Workers' Act did not bar the employee from suing his employer-bare boat charterer.

In the case at bar, Litton Systems, Inc. had full possession and control of DD-966.

In the case of *Griffith v. Wheeling Pittsburgh Steel Corporation,* Cer. den. 96 S. Ct. 785, (3rd Cir. 1975), interpreted 33 USC Section 905(b) as follows, to-wit:

> "The effect of the second clause of the first sentence of §905(b) is to eliminate the vessel's *Ryan* action against the stevedore. The effect of the next from last sentence is to eliminate the longshoreman's *Sieracki* third party action for unseaworthiness against the vessel. The effect of the first clause of §905(b) is to create in their place, a new negligence third party cause of action against the vessel, and the effect of the last sentence is to make that cause of action the exclusive remedy of a longshoreman against a vessel. The second sentence relieves the vessel from liability for negligence caused by persons engaged in providing stevedoring services, thus preventing the imposition of liability on the vessel on some respondeat superior or absolute duty of care basis. ***
>
> "But while logic and common sense suggest the literal application of §905(a), the ghost of *Sieracki-Ryan* stands in the way. The Supreme Court has already construed the exclusive remedy provision as permitting a suit against a *pro hac vice* owner who was also an employer. In *Reed v. The Yaka*, 373 U.S. 410, 83 S. Ct. 1349, 10 L.Ed.2d 448 (1963), a longshoreman was injured as a result of an unseaworthy condition on board the vessel The Yaka, which was under bareboat charter to Pan-Atlantic Steamship Corporation, his employer. Reed brought an in rem action against the vessel. He was not a member of the crew, and thus was covered under LHWCA. Reviewing the way in which *Sieracki* and *Ryan* had already made an end-run around the

exclusive remedy provision in §905(a) (then §905), Justice Black, writing for the Court, concluded:

> 'In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. . . .' 373 U.S. at 415, 83 S. Ct. at 1353.

"Thus §905, now §905(a), was held to be no bar to a suit against a vessel chartered to a *pro hac vice* owner which was also an employer liable for compensation payments. As the treatise writers have observed:

> 'After *Reed v. The Yaka* the longshoreman's action might just as well have been brought directly against his employer—which would have simplified the situation procedurally. However, in the customary employment situation, the parties, out of politeness or inertia, continued to observe the elaborate formalities of the *Sieracki-Ryan* ritual: longshoreman sued ship or shipowner, who impleaded employer in his third party indemnity action. . . .'
>
> G. Gilmore & C. Black, The Law of Admiralty §6-55, at 445 (2d ed. 1975) (footnote omitted).

Since Congress made no change in the operative language of the exclusive remedy provision, we would appear to be bound by the eviscerating construction of *Reed v. The Yaka,* supra. Congress was aware of that construction, and deliberately

chose to deal with it only to the limited extent of the second sentence is §905(b). The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own 'owner' occasioned negligence. See 1A Benedict on Admiralty §27, at 2-24; §115, at 6-16 (7th ed. 1973)."

Also, see *Napoli v. Hellenic Lines,* 536 F.2d 505 (2nd Cir. 1976).

In the case of *Duncan v. Dravo Corporation,* 426 F. Supp. 1048 (Penn. 1977), the U.S. District Court held as follows in interpreting Section 905(b):

"[1] In the 1972 amendment of §905, Congress revitalized the exclusive remedy provision by eliminating the vessel's right to recover indemnity from the employer and eliminating unseaworthiness as a basis for recovery from the vessel. But in so doing, Congress chose not to completely negate the scheme of vessel liability established by judicial precedent. It did not preclude all suits against the vessel for damages, even though unseaworthiness would no longer afford a no-fault basis for recovery. Section 905(b) expressly provides that a negligence action against the vessel is not excluded by §905(a), reflecting a Congressional determination that although longshoremen do not incur the peculiar hazards of seamen which give rise to the extensive remedy of unseaworthiness, permitting a fault-based remedy in negligence would encourage vessel safety without detracting from the policies underlying §905(a).

"[2-5] Nor did Congress negate the judicial precedent permitting suit against the vessel even when the vessel is also the employer. To the contrary, Congress intended to afford all longshoremen, regardless

of whether employed directly by the vessel or by an independent contractor, identical remedies for injuries suffered. The only limitation imposed in §905(b) on a negligence action against a vessel-employer is that the longshoreman cannot sue for the negligence of those providing longshoring services. This limitation is entirely consistent with Court precedent of treating the vessel-employer as separate entities for purposes of §905. The vessel-employer will not be held responsible for damages, other than compensatory benefits due under the Act, for breaches of duties arising out of the employer-employee relationship, but it will be subject to liability for damages caused by negligence in the capacity of vessel owner. Whether the vessel owed the longshoreman a duty and was at fault will be determined by traditional negligence principles, as if the longshoreman were a business invitee of a land-based property owner. *Anuszewski v. Dynamic Mariners Corp. Panama,* 391 F. Supp. 1143 (D.Md. 1975); *Ramirez v. Toko Kaiun K.K.,* 385, F. Supp. 644 (N.D.Cal. 1974).

"[6] *This brief history reveals that to hold that a §905(b) negligence action is precluded when the vessel is not in navigation would compel an unwarranted and overly restrictive reading of the statute.* The 'ghosts' of *Sieracki* and *The Yaka*, supra, have clearly survived the 1972 amendments insofar as they permit a longshoreman to sue the vessel for damages whether the longshoreman be employed by the vessel or not. Even before the 1972 amendments, the Supreme Court had not concluded in *Roper,* supra, and *West,* supra, that in negligence analysis a vessel not in navigation did not owe a longshoreman a duty of reasonable care, or that the longshoreman was precluded from recovering damages from the vessel for its negligence. In both

Roper and *West*, in fact, after determining that unseaworthiness would not avail a remedy, the Court noted that no negligence was proved. Congress has now specifically provided that a negligence remedy is available and that Courts must engage in traditional negligence analysis to determine if a duty was owed and breached, and we see no reason to limit that action to situations in which the longshoreman could have recovered for unseaworthiness." (Emphasis added).

The case of *Fitzgerald v. Compania Naviera La Molinera,* 394 F. Supp. 402 (L.A. 1974), the District Court, in interpreting Section 905(b) held as follows, to-wit:

"***Thus, where the vessel owner employs his own longshoremen or ship repairmen, and one of these employees is injured by the negligence of a member of the crew of the vessel, the injured employee may sue his employer; the suit against the vessel owner is not to be denied because the usual scheme of structuring the employment relationships along the waterfront is not followed."

Also, see *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (Vir. 1976) and *Allied Towing Corp. v. Tatem,* 580 F.2d 702 (4th Cir. 1978).

In the case of *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977), 905(b) was discussed by the Fifth Circuit as follows:

"It is important to note, however, that the basic problem envisioned in *Yaka* is still present. Why should an employee be treated differently solely because the ship on which he is injured happens to be owned by his employer instead of a third party? We think that Congress was sympathetic to this problem when it amended the LHWCA. Section

905(b) allows an employee to sue a 'vessel' for its negligence. The term 'vessel' is defined in the 1972 Amendments to include 'said vessel's owner, owner *pro hac vice*, agent, operator, charterer or bare boat charterer, master, officer, or crews member.' 33 U.S.C. §902(21) (Supp. II, 1972). Our legislators were well aware of the fact that shipowners, owners *pro hac vice* and charterers frequently have their own employees perform tasks covered by the LHWCA, but no special provision was made for that situation.

"Our interpretation of the statute is amply supported by its legislative history. Far from expressing an intent to overrule *Yaka* legislatively as it had done with *Ryan* and *Sieracki*, the House Report demonstrates that Congress intended the *Yaka* rule to survive:

> 'The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (83 S.Ct. 1349, 10 L.Ed.2d 448) (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (87 S. Ct. 1419, 18 L.Ed.2d 488) (1967), held that the unseaworthiness remedy is available to the injured employee. *The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in*

> *performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.* (Emphasis added).

> "[3] We hold, then, that an employee may sue his employer qua vessel if he was injured as a result of the vessel's negligence. We note that the other two circuits which have considered this issue have resolved it as we have. *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2nd Cir. 1976); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S. Ct. 785, 46 L.Ed.2d 643 (1976). Since the district court dismissed this action because the vessel and the employer were one and the same we must reverse and remand for proceedings not inconsistent with this opinion." (Footnotes omitted).

In *Duncan v. Dravo, supra,* the barge the injured employee was working on repairing was a vessel not in navigation. The Court said:

> "Because this unseaworthiness remedy would not have been available to longshoremen repairing a vessel not in navigation, the Defendant asserts that a negligence action under amended §905(a) & (b) is likewise unavailable. We believe that §905(b) and the judicial precedent which survived Congressional revision of the Act provide otherwise."

Congress in its wisdom in Section 905(b) gave a cause of action for negligence of a vessel in the event of injury to a person covered under the Act. For the first time in the Longshoremen's and Harbor Workers' Act it defined

"vessel" as any vessel upon which or in connection with any person entitled to benefits under the Act suffered injury or death arising out of his employment. That cause of action lies not only against the vessel, but the vessel's owner, owner *pro hac vice*, agent, operator, charterer or bare boat charterer, master, officer, or crew member.

It is submitted that there are not any existing conflicts between the Circuit Courts of Appeals and that the Petition for Writ of Certiorari should be denied.

CONCLUSION

It is therefore submitted that the Court of Appeals' decision does not conflict with the decisions of this Court and that there are no existing conflicts between the Circuit Courts of Appeals and that the Petition for Writ of Certiorari should be denied. It is further submitted that the Claimant-Respondent in this cause has a cause of action against Litton Systems, Inc. for its negligence, if any, as owner-employer and that the Petitioner is not insulated from suit under 33 USC 902(21), 33 USC 905 and 33 USC 933(i).

Respectfully submitted,

BOBBY G. O'BARR
Attorney at Law
Post Office Box 541
Biloxi, Mississippi 39533
(601) 435-5536

Attorney for
Claimant-Respondent.

No. 80-809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LITTON SYSTEMS, INC.,
Petitioner,

v.

ALVIN L. LUNDY,
Respondent.

BRIEF OF AMICUS CURIAE SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUNIUS C. MCELVEEN, JR.
LAWRENCE P. POSTOL
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 463-2400

J. STEPHEN STREET
Vice President and General Counsel
Shipbuilders Council of America
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 338-7722

Attorneys for Amicus Curiae Shipbuilders Council of America

January 19, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. SUMMARY OF THE ARGUMENT	2
III. STATEMENT OF INTEREST OF AMICUS CURIAE	3
IV. REASONS FOR GRANTING THE WRIT	3
A. The Fifth Circuit's Decision Undermines The Statutory Framework Of The Longshoremen's Act By Defeating The Exclusive Remedy Provision With Respect To Shipbuilders	3
B. The Fifth Circuit's Decision To Include Incomplete Vessels Within The Scope Of Third Party Actions Conflicts With The Pre-1972 Case Law Upon Which Congress Relied In Enacting Section 5(b)	9
C. Section 5(b) Cannot Encompass Incomplete Vessels In That There Is No Rational Method For Distinguishing Shipbuilding Negligence From Vessel Negligence Until The Ship Is Completed	13
V. CONCLUSION	15

TABLE OF AUTHORITIES

Court Decisions	Page
Alfred v. *M/V Margaret Lykes*, 398 F.2d 684 (5th Cir. 1968)	12
Arvidson v. *Dillingham Corp.*, 462 F.2d 1 (9th Cir.), *cert. denied*, 409 U.S. 983 (1972)	10
Atkins v. *Greenville Shipbuilding Corp.*, 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969)	12
Bloomer v. *Liberty Mutual Insurance Co.*, 100 S.Ct. 925 (1980)	8
Califano v. *Sanders*, 430 U.S. 99 (1977)	9
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1980)	11
Frankel v. *Bethlehem-Fairfield Shipyard, Inc.*, 132 F.2d 634 (4th Cir. 1942)	11
Haas v. *653 Leasing Co.*, 425 F.Supp. 1305 (E.D. Pa. 1977)	10
Hollister v. *Luke Construction Co.*, 517 F.2d 920 (5th Cir. 1975)	11
Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. *Morgan*, 551 F.2d 61 (5th Cir.), *cert. denied*, 434 U.S. 966 (1977)	6
Northeast Marine Terminal Co., Inc. v. *Caputo*, 432 U.S. 249 (1977)	2
P.C. Pfeiffer Co., Inc. v. *Ford*, 444 U.S. 69 (1979)	2
Reed v. *The Yaka*, 373 U.S. 410 (1963)	4
Roper v. *United States*, 368 U.S. 20 (1961)	11
Seas Shipping Co., Inc. v. *Sieracki*, 328 U.S. 85 (1946)	8
Smith v. *Guerrant*, 290 F.Supp. 111 (S.D. Tex. 1968)	9

Statutes and Legislative History

Longshoremen's and Harbor Workers' Compensation Act (LHWCA) (PL 92-572)	
33 U.S.C. § 901 (1976)	1
33 U.S.C. § 902(21) (1976)	5
33 U.S.C. § 905(a) (1976)	4
33 U.S.C. § 905(b) (1976)	4
S. Rep. No. 92-1125 (1972)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-809

LITTON SYSTEMS, INC.,

Petitioner,

v.

ALVIN L. LUNDY,

Respondent.

BRIEF OF AMICUS CURIAE SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. INTRODUCTION

Pursuant to Supreme Court Rule 36, the Shipbuilders Council of America, having obtained the written consent of all parties,[1] submits this Brief as Amicus Curiae, in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The Petition asks this Court to review a decision of the Fifth Circuit which could subject the United States shipbuilding industry to a flood of third party negligence suits and render the exclusive remedy provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 (1976) (hereinafter referred to as the "Longshoremen's Act"), meaningless.

---

[1] *See* Appendix.

II. SUMMARY OF THE ARGUMENT

The Fifth Circuit decision held that an injured shipyard employee can maintain a negligence action against his employer as owner of an incomplete U.S. Navy vessel upon which the worker was injured. The Shipbuilders Council submits that this decision is in conflict with the Longshoremen's Act, which provides that an injured worker's exclusive remedy against his employer is workers' compensation under the Act. While the Act in section 5(b) does provide for third party negligence suits against completed vessels in navigation, Congress never intended that the term "vessel" be interpreted to include incomplete vessels. Such an interpretation would result in shipyard workers being able to sue their employers for negligence for any injury during the various stages of the shipbuilding process. The ensuing litigation would render meaningless the worker's compensation scheme of the Act for the entire shipbuilding industry.

This Court has considered delineation of the scope of the compensation remedy of the 1972 Amendments important enough to merit two decisions in recent years: *P. C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69 (1979); *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977). This Court defined the term "longshoremen" early in the life of the 1972 Amendments so that all parties were apprised of their respective rights and liabilities under the compensation provisions of the Act. Similarly, it is of equal importance for this Court to provide guidance regarding the definition of the term "vessel" for purposes of third party negligence suits so as to provide an early and definitive statement regarding the rights and obligations of "third parties" in this exclusively federal area of litigation.

III. STATEMENT OF INTEREST OF AMICUS CURIAE

This Amicus Curiae Brief is filed on behalf of the Shipbuilders Council of America. The Shipbuilders Council is the national industry association representing major shipbuilders, ship repairers and ship component manufacturers throughout the United States. The Council's members are responsible for the construction of virtually all large United States military vessels and for a vast majority of the private ship construction of oceangoing vessels in the United States.

Because its members are located throughout the United States, and because individual members have shipyards in more than one judicial circuit, the Council is particularly concerned that the courts uniformly interpret the responsibilities of shipbuilders. The Fifth Circuit decision, which this Court is being asked to review, threatens the financial stability of the shipbuilding industry and conflicts with prior court decisions as to the interpretation of the Longshoremen's Act and maritime jurisdiction. The Council respectfully asks this Court to accept Litton System Inc.'s Petition for Writ of Certiorari and resolve this important issue.

IV. REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Decision Undermines The Statutory Framework Of The Longshoremen's Act By Defeating The Exclusive Remedy Provision With Respect To Shipbuilders

The decision of the United States Court of Appeals for the Fifth Circuit eviscerates the exclusive remedy provision of the Longshoremen's Act for the shipbuilding industry. One of the fundamental features of the Longshoremen's Act, like all workers' compensation statutes, is that the worker is provided statutory compensation, without regard to fault, but that such compensation is the exclusive remedy of the worker against his employer. Section 5(a) of the Longshoremen's Act is

very specific in providing that the statutory compensation under the Act is "exclusive and in place of all other liability of such employer to his employee . . . ." 33 U.S.C. § 905(a) (1976).

The Longshoremen's Act, in section 5(b), in conjunction with section 33, provides that injured employees may bring third party negligence suits against vessels if the negligence of the vessel caused the worker's injury.[2] Congress also provided that where the vessel supplies its own stevedoring, shipbuilding or ship repair services, and thus the vessel and the employer are one and the same, the worker can sue the vessel/employer in a third party negligence suit, but only for "vessel" negligence as opposed to stevedoring, shipbuilding or ship repair negligence.[3]

---

[2] Section 5(b) of the Act provides as follows:

> In the event of injury to a person covered under this Act caused by the *negligence of a vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, *no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.* The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

33 U.S.C. § 905(b) (1976) (emphasis added).

[3] See the second and third sentence of section 5(b) of the Act. 33 U.S.C. § 905(b) (1976). This exception allowing a negligence suit against a vessel/employer was based on the decision of *Reed*

The broad issue thus raised by this appeal is whether section 5(b) is applicable to a vessel under construction. More specifically, the question which must be decided is whether an incomplete vessel falls within the definition of a "vessel" under section 5(b). This, of course, would determine the application of the term "vessel" to the shipbuilding industry. The legislative history and relevant case law indicate that the term "vessel" refers to a completed ship in navigation, and not an incomplete ship or portions of a ship under construction. The resolution of this issue by this Court is of paramount importance to the shipbuilding industry, because the decision of the Fifth Circuit totally undermines the exclusive remedy provision of the Act for the industry.

The Longshoremen's Act definition of a "vessel" provided in section 2(21) does not resolve the question in that it uses the word "vessel" in defining the term "vessel."[4] Thus, we must go beyond the face of the

---

v. *The Yaka*, 373 U.S. 410 (1963), in which the Supreme Court held that since an employee can normally sue the vessel under the warranty of seaworthiness of the vessel, such a suit should be permitted even where the vessel is also the employer. *See S. Rep. No.* 92-1125 at 11-12 (1972).

This Court in *Reed* and related cases did not consider the question of whether general maritime negligence suits fall within the *Reed* doctrine. Those courts which have considered this issue have held that such suits are not encompassed by *Reed*. *See* part IV. B., *infra* at 10-13. Thus, an employer/vessel owner could not have been sued for general maritime negligence. While Congress in section 5(b) changed the standard of liability for third party suits from seaworthiness to negligence, it clearly did not mean to change the scope of such suits to encompass all of general maritime jurisdiction. Rather, Congress was relying on the prior case law under *Reed* and elsewhere which limited such third party suits to completed vessels. *See* part IV. A., *infra* at 7-9 and part IV. B., *infra* at 9-13 for a discussion of the legislative history and pre-1972 case law.

[4] Section 2(21) provides as follows:

> The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this

statute to interpret the term and hence the scope of third party negligence suits under section 5(b).

The Court of Appeals in *Lundy* held that injuries sustained aboard the incomplete U.S. Navy ship in question were within the jurisdiction of the Longshoremen's Act. The court then apparently reasoned that since the incomplete ship was within the scope of the Act for workers' compensation purposes, it must *a fortiori* be a "vessel" within the meaning of section 5(b) of the Act. While the court alluded to the fact that the ship was 97% completed, its citation to, and sole reliance on, the decision of *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc.* v. *Morgan*, 551 F.2d 61 (5th Cir.), *cert. denied*, 434 U.S. 966 (1977) indicates that the court would find even the simplest shipbuilding component structures to be "vessels" for third party negligence suit purposes. The Fifth Circuit in *Morgan* held that employees working on such structures, at whatever stage of completion, fall with the scope of the Longshoremen's Act generally.[5]

In contrast to the Fifth Circuit's *Lundy* decision, the legislative history of the 1972 Amendments reveals that Congress intended that third party negligence suits under section 5(b) would only be applicable to completed

---

Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer or crew member.

33 U.S.C. § 902(21) (1976).

[5] The Fifth Circuit, in *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc.* v. *Morgan*, 551 F.2d 61 (5th Cir.), *cert. denied*, 434 U.S. 966 (1977), held that the general compensation provisions of the Act encompass injuries sustained while working on incomplete ships (Morgan's death occurred in a shop). This hardly decides the issue of the definition of the term "vessel" under section 5(b) and thus whether third party negligence suits apply to incomplete vessels.

vessels. Congress relied on prior case law which limited the definition of vessels to completed ships. Indeed, Congress, in enacting section 5(b), thought it was reducing litigation over third party claims. Certainly Congress did not think it was allowing any new type of third party litigation or changing the compensation scheme of the Longshoremen's Act. In particular, there is absolutely no evidence that Congress wished to change drastically the structure of the Act and include the entire shipbuilding industry under the scope of section 5(b) third party negligence suits. Yet, this is the precise result of the *Lundy* decision, taken to its logical conclusion.

Congress, by adding section 5(b) to the Act, through the 1972 Amendments, intended to accomplish two straightforward results. First, Congress sought to limit the liabiltiy of vessels by eliminating the no-fault warranty of seaworthiness as to injured maritime employees covered under the Longshoremen's Act and restricting their cause of action to one based on negligence. Second, Congress sought to provide explicitly that a vessel owner could not attempt to pass on his liability to a worker's employer by seeking indemnity from him. Congress did not attempt to otherwise change the nature of third party actions. That is, while Congress changed the *standard of liability* to be utilized in such third party suits (from strict liability to negligence), Congress clearly did not intend to expand the *scope* of these suits and indeed the legislative history clearly demonstrates an intent to reduce the amount of third party litigation. *See S. Rep. No.* 92-1125 at 2, 4, 5, 9, 10-11, 25 (1972).[6]

---

[6] The Senate Report provides, in part, as follows:

> The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or

The Senate Report indicates, for example, that it was the Congressional concern with the cost of these third party suits that prompted it to attempt to reduce the number of such actions:

> The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs.

Id. at 9. It would be strange indeed, if Congress, while being concerned with the cost of litigation, greatly expanded the scope of litigation without even mentioning in its report that it was doing so. If third party suits are allowed against incomplete vessels, as the Fifth Circuit held, then the extent of third party litigation will be significantly expanded and, indeed, the entire shipbuilding process would be subject to third party suits. Virtually every shipyard worker who is injured during the years of construction of a ship could conceivably sue his employer/owner of the vessel for negligence.

This Court, in *Bloomer* v. *Liberty Mutual Insurance Co.*, 100 S. Ct. 925 (1980), recently noted that Congress was attempting, in the 1972 Amendments, to reduce, not create litigation and thus one cannot assume that new liability was created *sub silentio*:

> It would be ironic indeed if statutory amendments designed to eliminate the stevedore's liability in con-

---

indemnity agreements. It *continues* to allow suits against vessels or other third parties for negligence.

Id. at 5 (emphasis added). *See also S. Rep. No.* 92-1125 at 11-12 (1972), wherein the Senate Report discusses the *Reed* doctrine. Obviously the Senate would not have used the term "continues" if Congress intended to enlarge or change the permissible scope of third party litigation.

> nection with third-party actions were interpreted to give birth to an entirely new liability in the form of a charge for the longshoreman's legal expenses. We are unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation and to ensure conservation of the legal expenses of stevedores and their insurers.

Id. at 932. We would respectfully submit that the reasoning in *Bloomer* is equally applicable to the Fifth Circuit's attempt to expand greatly third party litigation.

B. The Fifth Circuit's Decision To Include Incomplete Vessels Within The Scope Of Third Party Actions Conflicts With The Pre-1972 Case Law Upon Which Congress Relied In Enacting Section 5(b)

The employee in the *Lundy* decision was a meter calibrator who was working on the construction and preparation of the ship for sea trials. The ship was neither completed nor commissioned and, thus, was not a "vessel in navigation." The Fifth Circuit determined that the incomplete ship was a "vessel" under section 5(b) of the Act, that the employer was the owner of the vessel since it had not yet been turned over to the Navy, and that under section 5(b) of the Act, the employer/owner of the vessel could be sued for negligence.[7] While the

---

[7] The Fifth Circuit appears to assume in this case that section 5(b) of the Longshoremen's Act is an independent grant of jurisdiction for the federal courts. The Shipbuilders Council contends that neither the language of the Act nor the legislative history of the 1972 Amendments evidence any intention on the part of Congress to create a new jurisdiction in the federal courts under the law of admiralty. *See Califano* v. *Sanders*, 430 U.S. 99 (1977). Courts have recognized that Congress intended to create federal court jurisdiction by means of section 21 of the Longshoremen's Act, 33 U.S.C. § 921 (1976); *See Smith* v. *Guerrant*, 290 F.Supp. 111, 113 n.13. (S.D. Tex. 1968). However, in that situation, the granting of federal jurisdiction was unambiguous, both in the statutory language and the legislative history.

Lundy case represents the first time that a circuit court has allowed a negligence suit by an employee against his employer/shipbuilder, the Ninth Circuit, as well as a district court in the Third Circuit, in cases involving injuries which occurred before the 1972 Amendments, considered such suits and rejected them. Since the legislative history reveals that Congress in enacting the 1972 Amendments did not change the scope of third party actions, there is a conflict among the circuits which this Court should resolve.

In *Arvidson* v. *Dillingham Corp.*, 462 F.2d 1 (9th Cir.), *cert. denied*, 409 U.S. 983 (1972), a worker who was injured on a barge which was under construction, sued his employer/owner of the barge for negligence and a breach of the warranty of seaworthiness. The Ninth Circuit affirmed a summary judgment for the shipyard. The court determined that the *Reed* doctrine, which permits unseaworthiness suits against employers/vessel owners, only allows such litigation where there is a completed vessel and the hazards of the sea exist. *Id.* at 2-4.

Similarly, in *Haas* v. *653 Leasing Co.*, 425 F. Supp. 1305 (E.D. Pa. 1977), the United States District Court for the Eastern District of Pennsylvania held that a nearly completed ship is not a vessel in navigation, and an injured worker could not recover under the warranty of seaworthiness from his employer/vessel owner. As in the instant case, the vessel in *Haas* was a launched but uncommissioned vessel which had been returned to the shipyard for further work after sea trials. The court in *Haas* relied on the traditional admiralty definition of a vessel which is a ship "engaged as an instrument of commerce or transportation." *Id.* at 1309. Like the *Arvidson* court, the district court did not interpret *Reed* as applying to incomplete vessels. *Id.* at 1309-13.

The circuit courts are thus in conflict over the issue of whether an incomplete ship is a vessel such that an injured worker can sue the shipyard/owner of the vessel outside of the compensation provisions of the Longshoremen's Act.[8] Moreover, the *Lundy* decision conflicts with pre-1972 case law which uniformly defined a vessel as a completed ship in navigation. The Fourth Circuit, for example, in *Frankel* v. *Bethlehem-Fairfield Shipyard, Inc.*, 132 F.2d 634 (4th Cir. 1942), held that a launched but not fully completed or commissioned ship was not a vessel under admiralty doctrine in that it had not "take[n] her place in commerce and navigation." *Id.* at 635. Similarly, this Court has recognized that a vessel is defined to include only vessels in navigation, *Roper* v. *United States*, 368 U.S. 20 (1961).

This Court, in interpreting the Longshoremen's Act, recently noted in *Edmonds* v. *Compagnie Generale Transatllantique*, 443 U.S. 256, 273 (1980), that the courts should not change admiralty doctrines once Congress has relied on them:

> Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the condi-

---

[8] As previously noted, the *Arvidson* and *Haas* courts were dealing with pre-1972 Amendment injuries. However, as discussed in part IV. A, *supra* at 7-9, the 1972 Amendments did not change the scope or jurisdiction of third party suits under the Longshoremen's Act and thus *Arvidson* and *Haas* would apply to post-1972 Amendment cases.

Moreover, there appears to be a conflict even within the Fifth Court itself. In *Hollister* v. *Luke Construction Co.*, 517 F.2d 920 (5th Cir. 1975), the Fifth Circuit held that a worker, who was injured while working on an incomplete barge, could not sue his employer for negligence or breach of the warranty of seaworthiness because an incomplete vessel is not a vessel in navigation. This is a post-1972 Amendment case and clearly conflicts with the Fifth Circuit's own decision in *Lundy*.

> tions would effectively alter the statute by causing it to reach different results than Congress envisioned.

Id. at 73. The Fifth Circuit's decision totally ignores this principle in that it defines "vessel" for third party liability purposes to include incomplete ships in contradiction to the well established admiralty doctrine that vessels are defined to include only vessels in navigation.

Interestingly, the Fifth Circuit, before the instant case, had long adhered to the doctrine that an incomplete vessel is not a vessel in navigation and thus the admiralty warranty of seaworthiness does not apply. This is especially important since, as noted in part IV. A., *supra*, the legislatively created third party negligence provision in section 5(b) of the Act derives from the warranty of seaworthiness doctrine, as that doctrine had been applied in *Reed*.

In *Alfred* v. *M/V Margaret Lykes*, 398 F.2d 684 (5th Cir. 1968), the Fifth Circuit determined that a ship which had been launched but not fully completed or commissioned was not a "vessel in service in navigation" and hence the warranty of seaworthiness was inapplicable. *Id.* at 686. The Court thus would not allow the injured worker to maintain an action against his employer. Again, in *Atkins* v. *Greenville Shipbuilding Corp.*, 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969), the Fifth Circuit held that for purposes of applying the maritime warranty of seaworthiness, a vessel is defined to include only ships in navigation and did not include a drydock. *Id.* at 282. The Court held that the injured worker could not sue his employer even though the employer also owned the alleged vessel. The court explicitly held that the *Reed* doctrine did not apply to incomplete vessels:

> While the *Sieracki*, *Reed* and *Jackson* decisions in one sense expanded the scope of the warranty, im-

> plicit within their rationale is the limiting factor of tradition. The limitation requires that the injured shore-based worker be engaged in work traditionally that of a seaman. . . . By the same token, the craft or structure said to owe a warranty of seaworthiness must fall within the traditional category of "vessels.". . . . Mere flotation on water does not constitute a structure a "vessel" for purposes of salvage nor warranty of seaworthiness. The element of risk and exposure to the hazards of the sea, necessary for the operation of and common to both principles, is absent upon floating drydocks.

Id. at 282-83.

The case law before the 1972 Amendments clearly held that a vessel was defined to include only a ship in navigation. Moreover, the warranty of seaworthiness only applied to such vessels in navigation. Thus, employers/owners of vessels could only be sued by injured workmen, outside of the Longshoremen's Act, for injuries on completed vessels in navigation. As noted above, Congress relied on this case law in enacting section 5(b) of the Act. The Fifth Circuit decision nct only ignored this reliance, but also, as noted below, attempts an impossible interpretation of section 5(b).

C. Section 5(b) Cannot Encompass Incomplete Vessels In That There Is No Rational Method For Distinguishing Shipbuilding Negligence From Vessel Negligence Until The Ship Is Completed

Section 5(b) of the Act is designed, in part, to deal with the situation where the owner of the vessel is also the employer of the stevedore or repairman. Since the worker normally cannot sue his employer but can sue the vessel for negligence, Congress struck the balance that the worker can sue his employer, who is also the vessel

owner, but only for "vessel" negligence.[9] We have already noted that the prior case law and legislative history demonstrate that the term vessel refers to a completed vessel. Moreover, and of great significance, the distinction between "vessel" negligence and "stevedore or shipyard worker" negligence can only be logically applied to completed vessels. Since section 5(b) requires that such a distinction be made, the conclusion is clear that section 5(b) was intended to apply only to completed vessels.

Indeed, section 5(b) assumes that two separate areas of responsibility exist—the stevedoring (or shipbuilding) operation and the vessel. While these two areas may be under the control of the same person (if the vessel employs the stevedores or shipbuilders), only the vessel area of responsibility is subject to negligence suits. The stevedoring or shipbuilding area of responsibility is encompassed only by the compensation provisions of the Act. Congress created this difference in liability because of the special hazards inherent in work on a vessel which is strange to the worker.[10] In order to encourage vessels to take precautions to reduce the risks from these special hazards, Congress provided for the continued liability outside of workmen's compensation. *S. Rep. No.* 92-1125 at 5-6, 10. The *Lundy* decision makes the assumption that the vessel area of responsibility exists, and thus negligence suits should be permitted, when in fact there

---

[9] *See* note 2 *supra*. While Congress used the term "shipbuilding or repair services," it clearly was referring to work on completed vessels which returned to a shipyard for repairs or shipbuilding additions. Most such ships, even when under repair, are still vessels in navigation since they still have some risks from having been in navigation, *e.g.*, the remains of past cargos. Thus, section 5(b) can be and is properly applied to them.

[10] Indeed, the vast majority of third party actions arise when a longshoreman is injured by an alleged defect in maintenance or cargo storage on a ship already in commerce.

is no such area of responsibility until the ship is completed and its crew takes command of the commissioned vessel. Before the ship is commissioned, the only area of responsibility is the shipbuilding process.

After a vessel is commissioned and in navigation, the vessel's area of responsibility and the negligence which can be caused by the vessel can be ascertained. Thus, if a boom is improperly maintained or oil is left on the deck, causing a hazard to longshoremen or shipyard workers, it may be attributed to "vessel" negligence. Similarly, any negligence with respect to the storage or type of cargo may be found to be vessel negligence. Such acts or omissions can be separated from "stevedore or repairman" negligence which would occur when a fellow worker or the employer failed to exercise proper care in the stevedoring operation or the repair work.

Before a ship is completed and in navigation, however, one cannot logically separate vessel negligence from shipbuilding negligence. The "vessel" *is* the very construction process and the building of the ship. Indeed, any negligence occurring prior to vessel completion must be shipbuilding negligence outside the scope of the cause of action contemplated by section 5(b).

V. CONCLUSION

The Petition For Writ of Certiorari should be granted. There is a conflict in the circuit courts over the question of whether an incomplete ship is a vessel under section 5(b) of the Act. The prior case law upon which Congress relied, as well as the legislative history, reveal that only completed vessels in navigation fall within the scope of section 5(b). The Fifth Circuit's refusal to recognize these facts has resulted in a decision which has

the potential for engulfing this Nation's shipbuilding industry in a flood of third party negligence litigation which would render the Longshoremen's Act meaningless for that industry. This Court should prevent this result and properly and consistently define maritime jurisdiction under section 5(b) of the Longshoremen's Act.

Respectfully submitted,

By _____
LAWRENCE P. POSTOL

_____
JUNIUS C. MCELVEEN, JR.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 463-2400

_____
J. STEPHEN STREET
Vice President and General Counsel
Shipbuilders Council of America
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 338-7722

Attorneys for Amicus Curiae
Shipbuilders Council of America

January 19, 1981

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. ———

LITTON SYSTEMS, INC.,
Petitioner

vs.

ALVIN L. LUNDY,
Respondent

CONSENT OF RESPONDENT TO THE FILING OF AMICUS CURIAE BRIEF

Now comes Alvin L. Lundy, Respondent in the above styled cause, by and through his counsel, and by these premises consents to the filing of an amicus curiae brief by the Shipbuilders Council of America.

This 10th day of December, 1980.

/s/ Bobby O'Barr
BOBBY O'BARR
One of Counsel
for Respondent
P.O. Box 541
Biloxi, MS 39533

[SEAL]

P.O. Box 149, Pascagoula, Mississippi 39567
601 935-1122

December 16, 1980

Steve Street, Esquire
Shipbuilders Council of America
Suite 420
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Re: *Litton Systems, Inc.*
vs. *Alvin L. Lundy*

Dear Steve:

During our recent conversations, we have discussed the filing of an amicus brief by the Shipbuilders Council of America.

We hereby consent to the filing of the brief by the Shipbuilders Council of America, as amicus curiae, in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Cause No. 80-809 in the Supreme Court of the United States.

Very truly yours,

INGALLS SHIPBUILDING DIVISION
LITTON SYSTEMS, INC.

/s/ John H. Carlson
JOHN H. CARLSON
Senior Staff Attorney

JHC:res

cc: J. Crowley, Esq.
K. Wiesenburg, Esq.
R. Ackerly, Esq.
Walter Meigs, Esq.
Bobby G. O'Barr, Esq.

CERTIFICATE OF SERVICE

I, Lawrence P. Postol, hereby certify that on this 19th day of January, 1981 three copies of the Brief of Amicus Curiae was mailed, first-class, postage prepaid, to each of the following:

Bobby O'Barr, Esquire
Counsel for Respondent
P.O. Box 541
Biloxi, MS 39533

John H. Carlson, Esquire
Senior Staff Attorney
Ingalls Shipbuilding Division
Litton Systems, Inc.
P.O. Box 149
Pascagoula, MS 39567

I further certify that all parties required to be served have been served.

LAWRENCE P. POSTOL
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON

Counsel for Amicus Curiae